

“Taxpayer Fairness”

U.S. House of Representatives Ways & Means Committee,

Subcommittee on Oversight

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Testimony of Professor Amandeep (Andy) S. Grewal

Subcommittee Chairman Pascrell and other distinguished members,

Thank you for inviting me to testify at this hearing on “Taxpayer Fairness.” Issues related to taxpayer fairness can never receive enough attention. I am delighted that the Subcommittee has chosen to focus on that topic today. I will use my brief oral remarks to discuss my impressions about taxpayer fairness and call greater attention to the challenges facing low-income taxpayers.

I hope that these further written remarks will help inform the Subcommittee’s interest in the *New York Times* [article](#) on President Trump’s tax and financial information. I understand that your Subcommittee might look for insights from that article as it continues its efforts to improve taxpayer fairness. With that in mind, I would like to flag some broad issues raised by the news article and encourage you to think about how those issues relate to fairness in tax administration.

1. *Taxpayer Privacy*. In the early days of the income tax, a substantial amount of individual tax return information was publicly available and was seized on by the media. During the 1860s, the NYT often published front-page features on prominent persons’ tax liabilities. But the paper’s style of reporting led to sharp criticism and raised taxpayer fairness issues. Tax returns contain sensitive information about an individual or his business methods. The IRS Commissioner himself warned about the dangers associated with publication of taxpayer return information. Congress soon limited how tax return information might be shared and, over time, developed the strong taxpayer privacy protections we see in the tax code today.

I understand that Congress might consider changes to taxpayer privacy laws. If the Subcommittee pursues those changes, I would encourage it to think about how increased mandatory public disclosure of tax return information

might reduce, rather than enhance, the public's confidence in the tax system. The Subcommittee should study the history of tax return privacy in our country and how the public values that privacy.

In thinking about those issues, I would also encourage the Subcommittee to consider how government officials around the country have conducted themselves over the past decades. Though leaks from our national security agencies or the White House seem rather common, the IRS and its state counterparts almost never leak. Tax officials seem to understand that leaks can damage the tax system.

Regarding the current President, I suspect that hundreds, maybe thousands, of federal and state employees have seen some or all of his tax return information over the past several decades. Yet they do not go running to the press. (My impression is that the leaks to the NYT arose outside of the government.) The people who operate the tax system at the state and federal levels understand the importance of taxpayer privacy. I would encourage the Subcommittee to keep that in mind as it thinks about making any changes to taxpayer privacy laws.

2. *Double Standards.* I understand that at least one bill has been proposed which would require tax return disclosures from elected officials within the executive branch.¹ If Congress adopts such a bill, I would encourage it to extend the new disclosure regime to the legislative branch. According to a 2017 news story, around 90% of federal lawmakers have refused or ignored media requests to produce their tax returns. See Roll Call, [*Lawmakers Want Trump's Tax Returns, but Won't Release Their Own*](#) (June 26, 2017). Though I am skeptical that Congress should mandate tax return disclosure for any elected officials, if Congress does so, it should apply the same standards to itself that it applies to others. Congress, under the Constitution, has the principal responsibility for creating the federal tax law. Conflicts of interest can arise just as easily for legislative branch officials as for executive branch officials. However, if Congress adopts a double standard, that could make the system seem unfair.

¹ See *For the People Act*, H.R. 1, 116th Cong. § 10001(b) (2019) (requiring disclosure of 10 years' tax returns for future candidates for President and Vice President, and for the current President and Vice President).

3. *Arbitrary Rules.* Though the NYT has not published its source documents, my understanding is that President Trump has been in a long-running dispute with the IRS over a \$70M+ refund claim. It is also my understanding, based on the reporting, that the legal issue in that dispute relates to whether President Trump engaged in a “sale or exchange” of a partnership interest, or if he instead “abandoned” it.

Oftentimes, an abandonment of property may be quite similar to a sale or exchange of property. Yet two economically similar transactions may generate highly distinct tax consequences. An “abandonment” may generate an ordinary loss, while a “sale or exchange” may generate a less-valuable capital loss.

For more than a decade, I have quizzed my students on this distinction. I’ve asked them to describe the potentially different consequences for a taxpayer who simply throws property in the trash (i.e., abandons it), versus a taxpayer who sells similar property for a dollar. They inevitably realize that, under the tax code, one transaction generates ordinary loss while the other generates capital loss. Yet I’ve never been able to figure out how to explain a sensible tax policy justification for the different treatments.

As the Subcommittee pursues its work, I would encourage it to consider how arbitrary rules in the tax code lead to taxpayer confusion. When economically similar transactions receive different tax treatment, it is the wealthiest taxpayers who benefit. They can hire advisers to avoid the tax code traps that might otherwise catch lower-income taxpayers. Though the tax code will always be complex—life is complex, and the tax law follows life—the Ways & Means Committee can improve taxpayer fairness by eliminating arbitrary distinctions that enrich few persons besides the wealthy and their tax advisers.

I look forward to discussing these and other important tax fairness issues with your Subcommittee. Thank you for this opportunity to share my thoughts.